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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WYATT HOWARD,

Plaintiff - Appellant,

v.

SMITHKLINE BEECHAM  
CORPORATION; et al.,

Defendants - Appellees.

No. 06-15159

D.C. No. CV-05-01536-DFL/GGH

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
David F. Levi, District Judge, Presiding

Submitted November 6, 2007\*\*  
San Francisco, California

Before: KLEINFELD, SILVERMAN, and W. FLETCHER, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court correctly concluded that Howard's claim is barred by limitations.

California law provides that a cause of action accrues "when the cause of action is complete with all of its elements." Nogart v. Upjohn Co., 981 P.2d 79, 83 (Cal. 1999). Accrual may be delayed, however, if the discovery rule applies. "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing." Jolly v. Eli Lilly & Co., 751 P.2d 923, 927 (Cal. 1988). Howard relies on a different formulation of the rule, citing Pereira v. Dow Chem. Co., Inc., 181 Cal. Rptr. 364 (Ct. App. 1982). This reliance is misplaced. "To the extent Pereira supports [Howard's] belief that accrual of the statute of limitations is delayed until the claimant has knowledge of specific facts establishing causation, it has been superseded by Jolly." Rivas v. Safety-Kleen Corp., 119 Cal. Rptr. 2d 503 (Ct. App. 2002).

Howard's attorney's declaration March 28, 2001, combined with Howard's own letter November 13, 2001, establishes that he "suspect[ed]" the claimed wrongdoing at least as early as November 13, 2001.

Effective January 1, 2003, the statute of limitations applicable to actions such as this was extended from one to two years. Compare Cal. Civ. Proc. Code § 340(3) (one year statute of limitations for “injury to ... one caused by the wrongful act or neglect of another”), with Cal. Civ. Proc. Code § 335.1 (West 2006) (two year statute of limitations for same). This change does not apply retroactively. See Doe v. Mann, 285 F. Supp. 2d 1229, 1241 n.6 (N.D. Cal. 2003). Therefore, because Howard’s cause of action accrued no later than November 13, 2001, it was subject to a one-year statute of limitations. See Cal. Civ. Proc. Code § 335.1 (West 2006).

The statute of limitations may be tolled if the defendant to an action “fraudulently concealed facts which would have led [the plaintiff] to discover his potential cause of action.” Snow v. A.H. Robins Co., Inc., 211 Cal. Rptr. 271, 275 (Ct. App. 1985). Though Howard argues that such tolling is appropriate here, he has submitted no admissible evidence to support this claim.

Finally, the statute of limitations is tolled for a maximum of two years if the plaintiff is imprisoned at the time the cause of action accrued. See Cal. Civ. Proc. Code § 352.1 (West 2006). Assuming that Howard was imprisoned at all relevant

time, giving him three years instead of one to file suit, he would have had to file by November 2004. He did not file suit until August 1, 2005.

AFFIRMED.